No. 85-885

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

CARTER ZELEZNIK, Administrator of the Estate of ARNOLD FRANK ZELEZNIK Deceased, and CARTER ZELEZNIK and ELIZABETH JANE ZELEZNIK in their own right,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does not the reasoning of this Court in *United States v. Kubrick*, 444 U.S. 111 (1979), compel application of the discovery rule to toll the statute of limitations when, despite due diligence, a plaintiff cannot discover for at least two years following injury the involvement of the government in causing the death of his decedent?

2. Did not the lower court err when it determined that active fraudulent concealment must be present before the discovery rule can be applied under the Federal Tort Claims Act (FTCA) to toll the statute of limitations in non-medical malpractice actions?

3. Does not the decision of the Court of Appeals for the Third Circuit ignore the humane purpose of Congress in enacting the FTCA and does it not reduce the FTCA to a delusive remedy for plaintiffs?

4. Is there not confusion among the various United States Circuit Courts of Appeals as to whether the statute of limitations should be tolled when the most direct and immediate cause of an injury is known at the time of injury but the identity of the United States as another responsible tortfeasor is unknown and unknowable for at least two years?

LIST OF PARTIES

The parties appearing before the United States Court of Appeals for the Third Circuit were Carter Zeleznik, Administrator of the Estate of Arnold Frank Zeleznik Deceased, and Carter Zeleznik and Elizabeth Jane Zeleznik in their own right and the United States of America.

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No.

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Carter Zeleznik, Administrator of the Estate of Arnold Frank Zeleznik Deceased, and Carter Zeleznik and Elizabeth Jane Zeleznik in their own right pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 2, 1985, which judgment affirmed the order of the United States District Court for the

Eastern District of Pennsylvania granting summary judgment dismissing as time-barred petitioners' claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§1346(b), 2401(b), 2671 *et seq.* (1982).

OPINIONS AND ORDERS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania may be found in the Appendix hereto (Appendix 13a).

The opinion of the Court of Appeals for the Third Circuit may be found in the Appendix hereto (Appendix 3a) and is reported at 770 F.2d 20 (3d Cir. 1985).

The order of the Court of Appeals for the Third Circuit denying rehearing en banc may be found in the Appendix hereto (Appendix 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1985. A timely petition for rehearing en banc was denied on August 26, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

28 U.S.C. §2401(b):

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by

certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(As amended Nov. 1, 1978, Pub. L. 95-563, §14(b), 92 Stat. 2389.)

STATEMENT OF THE CASE

A. Procedural History

This action was commenced on May 17, 1984, by Dr. Carter Zeleznik and Elizabeth Zeleznik in their own right and with Dr. Zeleznik acting as administrator of the estate of the Zelezniks' son, Arnold Frank Zeleznik. The action was brought in the United States District Court for the Eastern District of Pennsylvania under the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346 *et seq.*, §2671 *et seq.* and 28 U.S.C. §1331, following the timely filing of an administrative claim with the United States Immigration and Naturalization Service (INS) and formal rejection of the claim.

In July 1984, respondent United States of America moved the court to dismiss the complaint or in the alternative for summary judgment on the ground that the action was barred by the statute of limitations applicable to the FTCA, 28 U.S.C. §2401(b).

In a memorandum opinion and order dated October 18, 1984, the Honorable Donald W. VanArtsdalen granted the respondent's motion for summary judgment and entered judgment in favor of the respondent and against the petitioners (Appendix 13a).

A timely appeal was filed with the United States Court of Appeals for the Third Circuit. On August 2, 1985, the Honorable Collins J. Seitz issued the opinion of the court, affirming the order of the district court (Appendix 3a). A timely motion for rehearing

en banc was denied by the Court on August 26, 1985, with one judge (not a member of the original panel) dissenting (Appendix 1a).

B. Factual Background

On December 20, 1974, petitioners' son, Arnold Frank Zeleznik, age nine, was murdered in a ritualistic-style execution involving repeated stabbings by Vernal Walford at the Crossways Inn in Miami, Florida. Mr. Walford had been recently released from Northampton State Hospital, a Massachusetts state psychiatric facility, following an involuntary commitment for a psychotic episode. During his admission at that facility, Mr. Walford exhibited violent and combative behavior, including vicious assaults on various staff members. Mr. Walford was discharged from the psychiatric facility without any real treatment or therapy and with little or no improvement in his condition.

On September 21, 1982, petitioners received the shocking news that testimony was expected before the Massachusetts Legislature which would reveal for the first time the involvement of the United States Immigration and Naturalization Service (INS) in the death of Arnold Frank Zeleznik.

In October 1982, during those hearings concerning the improper discharge of Mr. Walford from the state psychiatric institution at Northampton, testimony was presented which revealed that, following discharge from the state hospital, Mr. Walford had presented himself to an office of the United States Immigration and Naturalization Service (INS) in Springfield, Massachusetts.

During that visit to the INS office in Springfield on December 2, 1974, less than three weeks before the murder, Mr. Walford informed the INS employee present of his participation in an

"exchange" involving marijuana, and further revealed that he had used a false name to obtain a social security card, had obtained a false passport, had used the false passport in the past to leave and re-enter the United States and had been released recently from the state psychiatric hospital after "going crazy." While at the Springfield INS office, Mr. Walford exhibited bizarre behavior, told of hearing the voice of God and surrendered his false passport and birth certificate.

Despite Mr. Walford's admitted status as an illegal alien, his admissions of committing various felonious acts in violation of federal laws, his obviously bizarre speech and actions and his stated history of a recent psychiatric hospital admission, the INS agent in Springfield took no action to notify state or federal authorities, to detain Mr. Walford or to investigate his status. Mr. Walford left the INS office after giving the INS agent his then-current residential address. Inexplicably, no inquiry was made of the state psychiatric facility as to Mr. Walford's mental status. Had such an inquiry been made, Mr. Walford's extremely dangerous and violent behavior would have become known to the INS agent. Instead, the Springfield INS agent simply mailed a memorandum of the Walford visit to the Boston, Massachusetts, INS office.

The Boston office perpetuated the error of the Springfield office by doing nothing except directing a single inquiry to the Hartford, Connecticut, INS office. This inquiry allegedly revealed no record or further information concerning Vernal Walford.

As of December 2, 1974, however, the INS had in its possession an extensive file on Vernal Walford, in reality a Jamaican alien, which documented, *inter alia*, previous illegal activity and illegal entries into this country, deportations in 1972 and 1973 and previous bizarre behavior. Moreover, the INS file

on Walford specifically cautioned: "Be *Alert* 'Weirdo' " (emphasis in original).

The first possible inkling of the involvement of the INS in the tragic death of Arnold Frank Zeleznik arose during the 1982 hearings before the Massachusetts legislature. Prior to that time, attention had been focused on the negligence of the state psychiatric hospital personnel who released Mr. Walford without treatment *essentially because he was too violent for them to control.*

An extensive police investigation into the homicide of Arnold Zeleznik was conducted by the Miami police immediately after and for a significant period of time following the murder. The official murder investigation failed to uncover Mr. Walford's visit to the INS office or previous history of deportations. In addition, a civil suit was brought by petitioners in Massachusetts against the state hospital personnel responsible for releasing Vernal Walford. The involvement of the INS was also not discovered through this sphere of investigation. The Massachusetts action was judicially determined to be barred by the doctrine of sovereign immunity. Dr. and Mrs. Zeleznik, on their own, pursued every avenue of inquiry in an attempt to make sense of their son's tragic death. There simply was no clue of Mr. Walford's previous history with the INS. Thus, the testimony before the Massachusetts legislature came as a complete surprise to all concerned, except, of course, the INS itself.

When the involvement of the INS was discovered in September 1982, the petitioners in this action, Dr. and Mrs. Zeleznik, moved swiftly to undertake a preliminary investigation and evaluation of their potential claim against the government. They filed a timely administrative claim on September 19, 1983, which claim was formally rejected. They then filed the instant action under the Federal Tort Claims Act (FTCA), along with

a comprehensive set of interrogatories aimed at unearthing the facts of the involvement of the INS with the murderer of their son.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS FOR THE THIRD CIRCUIT IMPROPERLY LIMITED THE APPLICATION OF THE DISCOVERY RULE IN FTCA CASES.

A. The *Kubrick* rationale compels application of the discovery rule in this action.

The Court of Appeals for the Third Circuit mischaracterized petitioners' position in this action as seeking an *expansion* of the rule set forth in *United States v. Kubrick*, 444 U.S. 111 (1979) (Appendix 8a). Petitioners seek no such expansion. Expansion is unnecessary because the rationale of the *Kubrick* opinion itself compels application of the discovery rule to toll the statute of limitations in the instant action until that time when petitioners reasonably could have discovered the involvement of the United States government in the death of their son.

It is beyond dispute that the two-year statute of limitations applied in Federal Tort Claims Act (FTCA) actions[1] may be tolled in those situations where accrual of the cause of the action is postponed "until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury *and its cause*." *Kubrick*, 444 U.S. at 120 n. 7 (1979) (emphasis added);

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1. Circuit courts of appeals are in accord that federal, not state, law controls the statute of limitations in FTCA actions. *See, e.g., Tyminski v. United States*, 481 F.2d 257, 262-63 (3d Cir. 1973); *Quinton v. United States*, 304 F.2d 234, 235 (5th Cir. 1962).

Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982), *cert. denied sub. nom. Cattell v. Barrett,* 462 U.S. 1131 (1983) (emphasis added); *Stoleson v. United States,* 629 F.2d 1265, 1268 (7th Cir. 1980); *Waits v. United States,* 611 F.2d 550, 552 (5th Cir. 1980); *Steele v. United States,* 599 F.2d 823, 827-28 (7th Cir. 1979); *Lee v. United States,* 485 F. Supp. 883, 885-86 (E.D. N.Y. 1980); *Liuzzo v. United States,* 455 F. Supp. 1274, 1280 (E.D. Mich. 1980).

In such cases, courts are reluctant to charge a "blamelessly ignorant" plaintiff with the "unknown and inherently unknowable," and accrual of the action for purposes of the statute of limitations is deferred until these critical facts are ascertained. *Kubrick, supra,* 444 U.S. at 122, 120 n. 7.

In the instant case, the complaint set forth the material facts underlying this cause of action and made clear that, while the murder of Arnold Frank Zeleznik took place in 1974, petitioners did not and could not, despite reasonable diligence, discover the involvement of the defendant INS with his murderer until September 1982. The complaint set forth all the elements necessary to plead the applicability of the discovery rule.

The district court below determined that the petitioners had indeed exercised all due diligence and were blamelessly ignorant of defendant's involvement. As the district court stated, petitioners

> have not shied away from the unpleasant task of ensuring that those in any way responsible for the cruel murder of their son are held accountable for their actions . . . . It is a harsh result that the Zelezniks must go through life without their son; but it would be harsher still for them to go through life wondering whether there was anything else they

> could have done. *They have done all that anyone could expect them to do.*

(emphasis added) (Appendix 21a). The Court of Appeals for the Third Circuit did not challenge this determination of due diligence on the part of petitioners.

Despite the acknowledged blameless ignorance and due diligence of the petitioners, the courts below refused to apply the discovery rule and held that the statute of limitations began to run in 1974 when Vernal Walford murdered the Zelezniks' son, Arnold, although the petitioners did not and could not discover the relationship between Mr. Walford and the INS until 1982. The courts below thus narrowed the scope of the discovery rule to prevent its application in situations such as the one before this Court in which the most direct and immediate cause of an injury is known at the time of injury but the identity of another responsible tortfeasor and the existence of an entirely separate cause of action are unknown and unknowable for at least two years.

This Court in *Kubrick, supra,* through both its language and its rationale, indicated that ignorance of the "who" element of causation, like ignorance of the "what" element of causation, should postpone accrual of a cause of action, at least under certain circumstances. The *Kubrick* Court identified the "critical facts" that give rise to the accrual of a cause of action: that the plaintiff has been injured and the cause of the injury. *Kubrick, supra,* 444 U.S. at 121-22. Certainly, in the absence of knowledge of the identity of a tortfeasor, "cause" cannot be determined.

The statute of limitations is tolled until critical facts are discovered because the information "[t]hat he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the

putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Kubrick, supra,* 444 U.S. at 122. Once a plaintiff is "in possession of the *critical facts* that he has been hurt and who inflicted the injury, . . . [h]e is no longer at the mercy of the tortfeasor." *Id.* This Court in *Kubrick* thus clearly contemplated a tolling of the statute of limitations until those critical facts of injury and cause (including the identity of the tortfeasor) are discovered.

The courts below failed to make the important distinction between the immediate instrumentality of Arnold's death, known to be the psychotic murderer, Vernal Walford, and the underlying "cause" as set forth in petitioners' complaint, *i.e.*, the government's negligence in failing to investigate and detain Mr. Walford. When the proper focus is given to the government's negligence as the actual cause of Arnold's death, it is clear that petitioners filed a timely administrative claim against the United States.

The contacts between the INS and Mr. Walford were entirely unknown to the Zelezniks and the Miami homicide police who thoroughly investigated Arnold Zeleznik's murder. The information detailing the previous illegal entries and activities of Vernal Walford was not even properly disseminated within the INS, as evidenced by the fact that inquiries to the Boston, Massachusetts, and Hartford, Connecticut, INS offices by local INS personnel failed to reveal the facts about Vernal Walford's history. The information necessary to petitioners' discovery of the critical facts was in the hands of the potential defendant *only* — buried deep in the archives of the very same agency whose negligence led to the murder of Arnold Zeleznik. The information was out of reach of petitioners despite *all* due diligence. Once the first indication of Mr. Walford's contact with the INS was revealed in hearings before the Massachusetts legislature, the Zelezniks acted swiftly to gather further information and file their claim.

In summary, petitioners could not and did not discover the "critical facts" as contemplated by the United States Supreme Court in *Kubrick, supra,* until 1982. Their ignorance was entirely blameless. Yet the Court of Appeals for the Third Circuit would, in contradiction of *Kubrick,* charge petitioners with the "unknown and inherently unknowable" and deny them their claim against the INS, the legally culpable entity which allowed a seriously disturbed illegal alien to travel at will and commit a hideous, brutal act which, in a moment, snuffed out the bright light of promise and potential in Arnold Frank Zeleznik.

B. The Court of Appeals for the Third Circuit erred when it analogized non-discovery of critical facts to non-discovery of the legal consequences of such facts.

In its opinion, the Court of Appeals for the Third Circuit analogized the position of petitioners with the plaintiff in *Kubrick, supra* (Appendix 11a). This analogy is inappropriate and, once again, demonstrates the Third Circuit's attempt to constrict the teachings of *Kubrick.*

In *Kubrick,* the plaintiff was in possession of all the information necessary to initiate an action before the statute of limitations elapsed, including the involvement of the government. The plaintiff nonetheless failed to discover the legal implications of the facts known to him. In the instant action, the critical facts were not known to petitioners until many years after the injury. In *Kubrick, supra,* this Court clearly did not find the plaintiff to be blameless, since, although he was armed with the "critical facts," he failed to take timely action to determine his legal rights arising from those facts.

In the instant action, petitioners lacked the critical facts as to the identity of the United States. Unlike the plaintiff in *Kubrick,*

petitioners were powerless to act since they had no way of knowing of the involvement of the government in the death of their son. The Third Circuit's analogy therefore is inapposite, ignores *Kubrick's* focus on the plaintiff's blameless ignorance of critical facts and further demonstrates the court's attempt to improperly limit application of the discovery rule.

C. The Third Circuit erred in determining fraud to be a necessary element for application of the discovery rule in this action.

The Court of Appeals for the Third Circuit rejected the holding of the Second Circuit in *Barrett, supra,* as authority for the tolling of the statute of limitations in the instant action on the ground that, in *Barrett,* active concealment by the government provided equitable reasons for tolling the statute. Opinion of the Third Circuit, p. 6 (Appendix 9a). The Third Circuit dismissed *Barrett* as an exception to the general rule. *Id.*

A close reading of the *Barrett* opinion, however, makes clear that, while allegations of fraudulent concealment on the part of the government were made by plaintiffs in that action, the fraud itself was not the focus of the Second Circuit's decision to apply the discovery rule. Rather, the inherent difficulty faced by the plaintiffs in discovering the critical facts in possession of the putative defendants was the key to the court's rationale.

None of the other courts which have considered the discovery rule in non-medical malpractice cases have altered the basic framework of the rule to require an element of fraudulent concealment. *See, e.g., Barrett, supra; Steele, supra.*

Moreover, if fraudulent concealment were a necessary element of the discovery rule, the rule itself would be superfluous. Basic equitable principles demand that the statute of limitations be tolled whenever fraudulent concealment of critical facts is present.

Rather, the discovery rule is to protect plaintiffs in those situations where, despite the absence of fraud, the critical facts are unknown and inherently unknowable. The focus of inquiry in such situations is on the diligence of the plaintiffs and the unknowability of the critical facts, not the fraudulent behavior of the defendant. Of course, fraudulent concealment in some cases may be the reason why the critical facts are unknowable. Other factors such as loss, ignorance or negligence, however, may also prevent discovery, even in the absence of fraudulent concealment. The decision of the Third Circuit engrafts a new requirement onto the discovery rule, undermines the rule's rationale and restricts its application to those cases where the presence of fraud would, in any event, toll the statute.

D. The decision of the Third Circuit reduces the FTCA to a delusive remedy for plaintiffs and ignores the humane purpose of Congress in enacting the FTCA.

The holding of the Court of Appeals for the Third Circuit ignores the humane legisative plan provided by Congress to those injured as a result of the negligence of the United States. The FTCA was originally enacted with a one-year limitations period and, in 1949, the period was extended to two years. *Kubrick, supra,* 444 U.S. at 119 n. 6. The reason for the extension (in addition to bringing the Act more in accord with limitations periods for state tort actions and other federal statutes) was to eliminate unfairness to claimants. H. R. Rep. No. 276, 81st Cong., 1st Sess. 1 (1949), U.S. Code Cong. Service 1949, p. 1226. *See also, Kubrick, supra,* 444 U.S. at 119 n. 6.

The legislative purpose in enacting the FTCA can be analogized to that underlying the Federal Employees Liability Act (FELA). Both Acts are grounded in congressional desire to provide compensation to individuals injured as a result of the negligence of the United States. Congress, in enacting legislation by which

those injured by the negligence of the United States could be compensated, evidenced its humane purpose and desire to provide a remedy that was meaningful in both its scope and application.

In *Urie v. Thompson*, 337 U.S. 163 (1949), this Court laid the groundwork for the "discovery rule" (and the Court's later opinion in *Kubrick*) by holding that an action under the FELA did not accrue until the plaintiff's injury manifested itself. In *Urie*, the plaintiff contracted silicosis from his work as a fireman on a steam locomotive. The Court was reluctant to charge the plaintiff with the unknown and inherently unknowable and held that, because of the blameless ignorance of the fact of his injury, plaintiff's claim did not accrue under the FELA until the disease manifested itself. 337 U.S. 163, 169-70 (1949).

The *Urie* Court concluded that, by the passage of the FELA statute, Congress expressed its intention to provide a remedy to the injured. *Id.* If a plaintiff were barred from this remedy because of some "mechanical analysis," the Court reasoned, the humane purpose of Congress would be thwarted. *Id.*

The *Urie* Court rejected a rule which would, through a mechanical analysis of accrual, lead to unfair consequences, particularly when those unfair consequences were to be visited upon those with "blameless ignorance." *Id.*

To bar the Zelezniks from recovery against the government through a "mechanical analysis" of accrual is not only fundamentally unfair, but, as in *Urie, supra*, thwarts the purpose and intent of Congress to provide a meaningful remedy to the injured. The ruling of the Third Circuit reduces the FTCA instead to "only a delusive remedy." *Urie, supra*, 337 U.S. at 169.

II.

THE THIRD CIRCUIT'S REFUSAL TO APPLY THE DISCOVERY RULE IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS AND CREATES CONFUSION ON THIS ISSUE AMONG THE CIRCUITS.

Unlike the Third Circuit in the instant action, the Court of Appeals for the Second Circuit determined that, under *Kubrick*, a plaintiff's failure despite due diligence to discover the involvement of the government in causing injury tolls the statute of limitations in an FTCA action. *Barrett, supra,* 689 F.2d 324.

In *Barrett,* the plaintiff learned in 1975 that her decedent father had died twenty-two years earlier from the injection of a mescaline derivative administered to him while he was a civilian patient in a state psychiatric hospital and while he was unknowingly serving as a test subject in an Army chemical warfare experiment. The district court in *Barrett* determined that the statute of limitations under the FTCA barred the action and the Court of Appeals for the Second Circuit reversed.

The Second Circuit, in considering the decision of the lower court in *Barrett,* reviewed the teachings of *Kubrick* as to the critical facts of injury and its cause and determined that, although plaintiff had known the immediate cause of the decedent's death, the negligent injection of mescaline, the "critical facts concerning causation were not known and probably not discovered until the Army made [a] disclosure in 1975." *Barrett, supra,* 689 F.2d at 329. The court observed that, due to the circumstances in *Barrett,* the critical fact as to the identity of the government as a tortfeasor, as in the instant case, would not have been revealed no matter how diligently the plaintiff had pursued the case at the time of her decedent's death. *Id.*

The *Barrett* court pointed to an analogous case from the Court of Appeals for the Fifth Circuit in which the discovery rule was applied in a nonmedical malpractice case. In *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980), the United States Department of Agriculture had mistakenly determined Mr. Ware's cattle to be suffering from tuberculosis and ordered them killed. Mr. Ware was permitted to sue the United States more than two years after the event.

> [Ware] immediately knew of the injury, the death of his cattle, and its direct cause, that they were put to death. The critical causative fact that he did not know until later was that they need not have been slaughtered. Likewise [the *Barrett* plaintiff] knew that [her decedent] had died and that the direct cause of his death was, at least partly, the mescaline injection. What [she] was unaware of and had no reason to suspect, as in *Ware*, was that this was a death without reason caused by the Government's alleged negligence.

Barrett, supra, 689 F.2d at 329-30.

The decision of the Third Circuit in the instant action is in conflict with the decision of the Second Circuit in *Barrett, supra*, and the Fifth Circuit in *Ware, supra*. The Third Circuit attempted to minimize this conflict by seeking to distinguish *Barrett* on the basis of the presence of active fraudulent concealment in that action. Nonetheless, the issue of fraud was not the dispositive factor in the *Barrett* court's analysis. Rather, the *Barrett* court focused on the unknowability of the involvement of the government. The decisions of the Second Circuit in *Barrett* and the Fifth Circuit in Ware therefore now stand in direct conflict with the decision of the Third Circuit in the instant action and with those decisions of other Circuit Courts of Appeals which

have held that the lack of discovery of the identity of a potential tortfeasor will not toll the statute of limitations under the FTCA. *See, e.g., Dyniewicz v. United States*, 742 F.2d 484 (9th Cir. 1984); *Steele v. United States*, 599 F.2d 823 (7th Cir. 1979).

Until this Court definitively resolves the issue of the application of the discovery rule in those FTCA cases where the immediate cause of injury is readily apparent but, despite due diligence, the involvement of the United States in causing the injury cannot be discovered for some time, the law will remain confused on this issue of critical importance.

CONCLUSION

The holding of the Court of Appeals for the Third Circuit below constricts the holding of this Court in *Kubrick, supra,* by requiring petitioners to have discovered the inherently undiscoverable causal connection between the government and their son's murder. Moreover, the ruling of the Third Circuit superimposes on the statute of limitations the unwarranted requirement of fraud. This unprecedented requirement serves as an insurmountable barrier to plaintiffs like the Zelezniks who, through no fault of their own, are unable for a time to ascertain certain critical facts as to the identity of a tortfeasor which has caused a tragic and unnecessary death. The decision by the Third Circuit undermines the humane purpose of Congress in enacting the FTCA and, further, stands in direct conflict with the decisions of the Courts of Appeals for the Second and Fifth Circuits, causing confusion in an important area of law.

Wherefore petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

S. GERALD LITVIN
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APPENDIX A—SUR PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1656

ZELEZNIK, CARTER, Administrator of the Estate of ARNOLD FRANK ZELEZNIK, Deceased, and ZELEZNIK, CARTER and ZELEZNIK, ELIZABETH JANE in their own right,

Appellants

v.

UNITED STATES OF AMERICA

(Civil Action No. 84-2409—E.D.Pa.)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix A

By the Court

Circuit Judge

DATED: August 26, 1985

Judge Garth would grant the petition for rehearing.

APPENDIX B—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1656

ZELEZNIK, CARTER, Administrator of the Estate of ARNOLD FRANK ZELEZNIK, Deceased, and ZELEZNIK, CARTER and ZELEZNIK, ELIZABETH JANE in their own right,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 84-2409)

Submitted Under Third Circuit Rule 12(6)
May 1, 1985

Before: SEITZ, WEIS and ROSENN,
Circuit Judges.

Appendix B

(Opinion Filed: August 2, 1985)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

The plaintiffs, Carter and Elizabeth Zeleznik ("Zelezniks"), appeal from an order of the district court granting summary judgment dismissing as time barred their claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1982). This court has appellate jurisdiction to review final orders pursuant to 28 U.S.C. § 1291 (1982).

Appendix B

I.

The following facts are undisputed. On December 20, 1974, the Zeleznik's son, Arnold, was murdered by Vernal Walford in Miami, FLorida. Following their son's murder, the Zelezniks investigated Walford's background. They learned that at the time of the murder, Walford had been recently released from a state psychiatric hospital in Massachusetts where he had been involuntarily committed. They, however, did not discover that after his release, Walford, who was an illegal alien, had unsuccessfully attempted to surrender to the Immigration and Naturalization Service ("INS") in Springfield, Massachusetts. In 1975, the Zelezniks' action against the Massachusetts doctors and hospital was dismissed on the ground of sovereign immunity.

It was not until 1982 that the Zelezniks learned that Walford had visited the Springfield INS office a few days before the murder and had given an INS employee a full report of his illegal status, his fraudulent possession of a U.S. passport and his involvement in an illicit drug transaction. Yet the INS allowed him to leave. Walford's visit to the INS was uncovered in the course of a Massachusetts legislative investigation of the practices of the state psychiatric facilities.

Within two years of this discovery, on September 19, 1983, the Zelezniks filed an administrative claim with the INS under the FTCA for the wrongful death of their son, and Carter Zeleznik filed a claim as administrator of the son's estate for the son's injuries. They alleged that the INS was negligent in failing to detain Walford and in failing to investigate Walford's past. This claim was rejected by the INS, and the Zelezniks then filed this action in the district court.

Appendix B

The government moved to dismiss the complaint for failure to state a claim and also moved for summary judgment on the ground that the statute of limitations had run. Both parties submitted supporting affidavits and exhibits. The district court granted summary judgment in favor of the government on statute of limitations grounds. The Zelezniks then filed this timely appeal.

Upon a review of a grant of summary judgment, we do as the district court does: we consider the undisputed facts in the pleadings, affidavits, and exhibits and determine whether the movant was entitled to judgment as a matter of law. *First Jersey National Bank v. Dome Petroleum Limited,* 723 F.2d 335, 338 (3d Cir. 1983). The movant has the burden of demonstrating that there are no genuine issues of material fact, and all reasonable inferences from the record must be drawn in favor of the non-moving party. *Small v. Seldows Stationary,* 617 F.2d 992, 994 (3d Cir. 1980).

II.

Under the FTCA, a claim against the United States is barred unless it is presented to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. § 2401(b) (1982). The Zelezniks' claim is therefore time-barred if it accrued prior to September 19. 1981, two years before the date that they filed a claim with the INS. The Zelezniks contend that their claims against the United States Accrued in 1982 when they first learned of Walton's attempted surrender to the INS. The government contends that the Zelezniks' claim accrued in 1974 when Arnold was killed.

The determination of when a claim accrues for the purposes of the FTCA is a question of federal law. *Tyminski v. United*

States, 481 F.2d 257, 262-63 (3d Cir. 1973). The FTCA is a limited waiver of the sovereign immunity of the United States. The Supreme Court has admonished that the courts should carefully construe the statute of limitations for the FTCA so as not to extend the limited waiver of sovereign immunity beyond that which Congress intended. *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979).

The purpose of a statute of limitations is to encourage the filing of claims promptly by giving no more than a reasonable time within which to make a claim. By limiting the period in which a claim may be made, the statute protects defendants from having to defend actions where the truth-finding process is impaired by the passage of time. *Kubrick*, 444 U.S. at 117; *United States v. Marion*, 404 U.S. 307, 322 n. 14 (1971).

For tort actions, the general rule is that the cause of action accrues at the time of the last event necessary to complete the tort. Usually, this is at the time the putative plaintiff is injured. *Kubrick*, 444 U.S. at 120. An injured party, however, cannot make a claim until he has or should have had notice that he had an action to bring. Thus, the Supreme Court has held that an injured party's cause of action does not accrue until he learns of his injury. *Urie v. Thompson*, 337 U.S. 163 (1949). In most cases, when a person learns of his injury, he is on notice that there has been an invasion of his legal rights, and that he should determine whether another may be liable to him.

However, in some circumtances, a person may know that he has been injured but not be sufficiently apprised by the mere fact of injury to understand its cause. *Cf. McGowan v. University of Scranton*, 759 F.2d 287 (3d Cir. 1985) (statute of limitations does not accrue until plaintiff learns of the cause of injury when

plaintiff's decedent died of toxic shock syndrome at a time when the cause of toxic shock syndrome had not been discovered by medical science). In those circumstances, when the fact of injury alone is insufficient to put an injured party on notice of its cause, the Supreme Court has indicated that the accrual of the claim would be delayed until the injured party learns of both the fact of his injury and its cause. *Kubrick*, 444 U.S. at 122.

In the present case, at the time of their son's death, the Zelezniks knew of the immediate cause of his death, the act of Vernal Walford. They, however, did not know of an the alleged negligent participation of the INS. They argue that the rule in *Kubrick* ought to be extended so that the accrual of the cause of action against INS should not have accrued until they obtained knowledge of INS' alleged involvement. Several courts of appeals have considered and rejected similar contentions. In *Dyniewicz v. United States*, 742 F.2d 484 (9th Cir. 1984), the Ninth Circuit agreed that a cause of action does not accrue until the injured party discovers the cause of the injury, but held:

> Discovery of the cause of one's injury, however, does not mean knowing who is responsible for it. The 'cause' is known when the immediate physical cause of the injury is discovered.

742 F.2d at 486. *See also Steele v. United States*, 599 F.2d 823, 828 (7th Cir. 1979) ("The immediate cause of his injury . . . was apparent and should have put him on notice of an invasion of his legal rights"); *Richman v. United States*, 709 F.2d 122, 123-24 (1st Cir. 1983). *But see Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983).

The Zelezniks contend, however, that these cases take too

narrow a view of the general principle underlying the discovery rule announced in *Kubrick*. They argue that a proper reading of *Kubrick* would dictate a delay in the accrual of the cause of action until the date that the acts of the INS were discovered. They point to *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983), as standing for the proposition that accrual should be delayed until the government action is uncovered.

We do not read *Barrett* as supporting the Zelezniks' position in our factual context. Rather, *Barrett* involved active concealment by the government of its activities. 689 F.2d at 327-28. When the government actively conceals its own wrongdoing by misrepresentation, there may well be equitable reasons for tolling the statute of limitations. However, it is not suggested that the INS concealed its involvement with Walford. Indeed, it made a record of the incident. Thus, we are not required to consider what may well be an exception to the general rule.

We agree with those Courts of Appeals that have held that a claim accrues when the injured party learns of the injury and its immediate cause. The rationale of the discovery rule as announced in *Kubrick* is that the statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress.

The Court in *Kubrick* further held that the accrual date is not postponed until the injured party knows every fact necessary to bring his action. Rather, the Court indicated that the crucial question in determining the accrual date for statute of limitations purposes was when the injured party had sufficient notice of the invasion of his legal rights to require that he investigate and make

a timely claim or risk its loss. Once the injured party is put on notice, the burden is upon him to determine within the limitations period whether any party may be liable to him. *Davis v. United States*, 642 F.2d 328 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982). An injured party with the knowledge of injury and its immediate cause is in no worse position than any other plaintiff who must determine whom to sue in a obscure factual context. *See, e.g., Wilkinson v. United States*, 677 F.2d 998, 1002 (4th Cir.), *cert. denied*, 459 U.S. 906 (1982).

The Zelezniks contend, however, that the application of this "injury and immediate cause" standard would be unjust in their case because a reasonable investigation begun in 1974 would not have turned up the INS involvement. They are essentially contending that the statute of limitations does not begin to run so long as a reasonably diligent investigation would not have discovered the government's actions.

The difficulty with such a reasonableness standard is that it would make every accrual date indefinite as to unknown possible parties. The statute of limitations is meant to be applied in a uniform manner. *Steele v. United States*, 599 F.2d 823, 826 (7th Cir. 1979). Section 2401(b) does not guarantee that every injured party will necessarily be able to find and make a claim against a possibly responsible governmental agency. Rather, it represents a Congressional determination of a reasonable amount of time for injured parties in general to discover and make claims against the government. *See Kubrick*, 444 U.S. at 117. Clearly, the statute of limitations impacts more harshly on some cases than others. For some claims, two years is more than enough time to bring a claim, and for others, it is all too short. However, the statute reflects a Congressional judgment balancing the relative interests of plaintiffs and the government in fixing

a single definite limitations period.

Nor is the Zeleznik's position compatible with the Supreme Court's reasoning in *Kubrick*, even though that case is not precisely in point. In *Kubrick*, the Court stated that even if a putative malpractice plaintiff conducts a reasonable investigation and relies upon erroneous medical advice that there was no negligence, the beginning of the limitations period would not be postponed.

> [T]he putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make. If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit.

444 U.S. at 124. The Court's language suggests that once an injured party learns of his injury and its immediate cause, then he is on the same footing as any other injured party. The fact that a reasonably diligent investigation would not have discovered the defendant's involvement is no longer relevant for the purposes of accrual of the statute of limitations. *Davis v. United States*, 642 F.2d 328 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982).

The undisputed facts show that the Zelezniks knew in 1974 of their injury and its immediate cause. The Zelezniks therefore possessed sufficient critical facts to investigate, and there was no active concealment by the INS. Thus 1974 was the date when the statute began to run on any claim against the government.

Appendix B

Admittedly, there is a certain harshness in this application of the rule but such a consequence is implicit in statutes of limitations generally.

III.

The order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C—MEMORANDUM OPINION AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 84-2409

CARTER ZELEZNIK, et al.

v.

UNITED STATES OF AMERICA

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, J. October 18, 1984

In this wrongful death action, the plaintiffs, Carter and Elizabeth Jane Zeleznik allege that the Immigration and Naturalization Service (INS) breached a duty owed to them by failing to arrest and detain an illegal immigrant, Vernal Newland Walford, who in 1974 brutally murdered their son. The defendant has moved to dismiss on the grounds that the action is barred by the applicable statute of limitations, 28 U.S.C. § 2401(b).

On December 20, 1974, Vernal Walford murdered the Zeleznik's nine-year old son, Arnold Frank Zeleznik, at the Crossway Airport Inn in Miami, Florida. Eighteen days before the murder, Walford had walked into an INS office in Springfield, Massachusetts, and told an INS agent that he was an illegal immigrant and had recently been released from a state mental health facility.

Appendix C

According to the complaint, Walford revealed the following to the INS agent:

> (a) that he had come to the United States from Jamaica having been involved with the exchange of "a bit of paper" for some "grass";
>
> (b) that he had used the name "Bob M. Grant" to obtain a social security card;
>
> (c) that he had been furnished with the birth certificate of a "Bob Miller Grant";
>
> (d) that he had applied for and received a United States passport under the name "Bob Miller Grant";
>
> (e) that he had successfully "tried out" this illegally-obtained passport by using it to leave and re-enter the United States;
>
> (f) that he had worked for and recently been fired from the Milton Bradley Company after being struck in the head;
>
> (g) that he had recently been released from the Northampton State Hospital where he had been confined for a few days after he "went crazy";
>
> (h) that he had in his possession a prescription on Commonwealth of Massachusetts, Department of Mental Health stationery; and
>
> (i) that "God had told him to come in and tell

his story and clear everything up."

Complaint ¶ 11. The complaint further alleges that the INS, by failing to detain Walford and by failing adequately to investigate his alien status and his mental condition, was responsible for Arnold Zeleznik's death at the hands of Walford.

Although Walford's confession to the INS and the subsequent murder of Arnold Zeleznik took place in December of 1974, the Zelezniks did not discover that Walford had gone into the INS office until September 21, 1982. It was then that Carter Zeleznik was informed that Massachusetts legislative investigations of Walford's release from Northampton State Hospital had revealed that Walford had turned himself in at the INS office in Springfield, Massachusetts on December 2, 1974. Finally, on September 19, 1983, the Zelezniks filed the claim with the INS which is the jurisdictional prerequisite of this action under the Federal Tort Claims Act, 28 U.S.C. § 2401(b). *See Lien v. Beehner,* 453 F. Supp. 604, 605 (N.D.N.Y. 1978).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may not be granted unless the material allegations of the complaint, taken in a light most favorable to the complainant, are legally insufficient to support a claim. *Paolini v. Channel Home Centers,* 668 F.2d 721 (3d Cir. 1981). In determining a motion to dismiss, the court must limit its consideration to the facts alleged in the complaint. *Biesenbach v. Guenther,* 588 F.2d 400, 402 (3d Cir. 1978). Because both sides have attached exhibits to their memoranda in support of and opposition to this motion, I treat the motion as one for summary judgment.

In deciding a motion for summary judgment the court must determine whether the moving party has carried its burden of

showing that there are no genuine issues of material fact. *See Hollinger v. Wagner Mining Equipment Co.*, 667 F.2d 402, 405 (3d Cir. 1981). All reasonable inferences from the evidentiary material of record must be drawn in favor of the nonmoving party. *Small v. Seldows Stationery*, 617 F.2d 992, 994 (3d Cir. 1980). A response to a properly supported summary judgment motion may not rest upon the allegations of the pleading but must present, by affidavit or otherwise, specific facts sufficient to create a genuine issue of material fact. Fed. R. Civ. P. 56(e); *Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 96 (3d Cir. 1982). After examining the complaint and the memoranda and exhibits presented by each side, I conclude that there is no genuine issue of material fact precluding entry of summary judgment as a matter of law.

The Federal Tort Claims Act (FTCA) waives the federal government's sovereign immunity, permiting tort victims to sue the government under the terms set out in the Act. 28 U.S.C. § 2674. The "statute of limitations"[1] for actions under the Federal Tort Claims Act is provided in the Act itself: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b). Although state law governs liability under the Federal Tort Claims Act, the interpretation of the jurisdictional provision, 28 U.S.C. § 2401(b), is a matter of federal law. *Steele v. United States*, 599 F.2d 823,

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1. Although 28 U.S.C. § 2401(b) acts essentially as a statute of limitations, it has been noted that "[u]nlike a statute of limitations, this time limitation is jurisdictional and nonwaivable; in fact it may even be raised by the court *sua sponte*." *Lien v. Beehner*, 453 F. Supp. 604, 605 (N.D.N.Y. 1978); *see also Quinton v. United States*, 304 F.2d 234, 242 (5th Cir. 1962) (Hutcheson, J., concurring).

825-26 (7th Cir. 1979); *Tyminski v. United States*, 481 F.2d 257, 262-63 (3d Cir. 1973).

The issue to be determined is when the Zeleznik's claim accrued. Plaintiffs filed an administrative claim on September 19, 1983. If, as defendant contends, plaintiffs' claim accrued on December 20, 1974, when Arnold Zeleznik was murdered, then this action is barred by 28 U.S.C. § 2401(b). If, on the other hand, plaintiffs' claim did not accrue until September 21, 1982, when the Zelezniks discovered the events that took place at the INS office eighteen days before their son's murder, then plaintiffs' action is timely and § 2401(b) presents no obstacle.

A claim under the FTCA generally accrues when the plaintiff's injury is inflicted. *Davis v. United States*, 642 F.2d 328 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982). At the time of the injury, a putative plaintiff ordinarily knows the two facts critical to formulating and presenting a claim: (1) the fact of the injury; and (2) the person or instrumentality that inflicted the injury. *United States v. Kubrick*, 444 U.S. 111, 122 (1979). With these facts, a putative plaintiff can assess the party or parties legally responsible for the injury and reach a decision regarding whether and whom to sue. *Id.* at 123-24. By requiring a plaintiff to reach such a decision within two years from the date of the injury, the general accrual rule facilitates the intended policy of the statutory limitation period, "which is to encourage the prompt presentation of claims." *Id.* at 117. The prompt presentation of claims "protect[s] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Id.*

Appendix C

Courts have modified the general accrual rule in at least two circumstances in which the putative plaintiff does not know the facts critical to formulating and presenting a claim. First, where the plaintiff's injury does not manifest itself immediately, and thus the plaintiff is unaware that any injury has been inflicted, the courts have deferred the accrual of the claim until the plaintiff discovers, or with reasonable diligence should have discovered, the fact of the injury. *Tyminski v. United States*, 481 F.2d 257 (3d Cir. 1973); *see also Kubrick*, 444 U.S. at 120 & n.7; *cf. Urie v. Tompson*, 337 U.S. 163 (1949) (FELA cases). Second, where the manifestation of an injury is so removed in time from its source that the cause of the injury is not immediately apparent (as sometimes occurs in medical malpractice cases), courts have deferred accrual of the claim until the plaintiff discovers or with reasonable diligence should have discovered the cause of the injury. *See Kubrick*, 444 U.S. at 120.

In *Kubrick* the Supreme Court rejected a standard that would have deferred accrual even further, until the plaintiff discovered or should have discovered that the person who had caused the plaintiff's injury had acted negligently. 444 U.S. at 122. Once the injury and its cause are known, the plaintiff must seek out legal advice to assess the legal culpability involved and decide whether and whom to sue within the two-year statutory period. *Id.* at 123-24.

In the present case the plaintiffs were well aware of their injury at the time it occurred. Their son was murdered. The direct cause of their injury was also immediately apparent. Vernal Walford killed their son. The plaintiffs assert, however, that the alleged negligence of the government, which was an indirect or contributory cause of their son's death, was removed in time from the murder and was neither apparent nor discoverable until 1982.

Appendix C

The *Kubrick* decision mandates that a claim accrues when the injury and its cause are known. Once the injury and its immediate cause are known, the plaintiff has two years to assess any legal responsibilities and bring suit. In *Steel v. United States*, 599 F.2d 823 (7th Cir. 1979), the plaintiff was injured while installing runway lights at O'Hare International Airport in Chicago, Illinois. He sustained an electrical shock while connecting wires to a transformer box. The Seventh Circuit held that his claim accrued when the shock was received, not when the plaintiff discovered that the government maintained a remote power switch which allegedly could have been turned off to prevent his injuries. At the time of his injury "[t]he immediate cause of his injury—the live electric current—was apparent and should have put him on notice of an invasion of his legal rights." *Id.* at 828.

Similarly, in *Dyniewicz v. United States*, C.A. No. 83-2399 (9th Cir. Sept. 7, 1984), an action was brought for wrongful death under the FTCA by the survivors of victims drowned on a highway during a flood. The plaintiff had sued state officials immediately following the victims' deaths. More than two years after the deaths, plaintiff "discovered that the negligence of National Park Service rangers might have been a cause of the accident." *Dyniewicz*, slip op. at 3898. The Ninth Circuit held that plaintiff's FTCA claim was barred by § 2401(b). "Discovery of the cause of one's injury . . . does not mean knowing who is responsible for it. The 'cause' is known when the immediate physical cause of the injury is discovered." *Id.* at 3900. *Accord Davis*, 642 F.2d at 331; *Steele*, 599 F.2d at 828.

In the present case, the immediate cause of the Zelezniks' injury—Vernal Walford's assault upon and murder of their son—was apparent and put the Zelezniks on notice of an invasion of their legal rights. There are no allegations in the complaint, nor

has any suggestion subsequently been made, that the government acted fraudulently to conceal its contact with Walford. *Compare Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 3111 (1983); *Liuzzo v. United States*, 485 F. Supp. 1274 (E.D. Mich. 1980). The Zelezniks' claim accrued at the time their son was killed in 1974, and this action is therefore barred by § 2401(b).

A rule that did not provide for accrual upon the discovery of the injury and the immediate cause of the injury would frustrate the policy of the statutory limitation period. The rule of law urged by plaintiffs would extend indefinitely the period in which an action could be instituted.

As a hypothetical example, assume a plaintiff is injured in a car accident and the driver of the car at fault is killed, leaving no record that the car had been serviced eighteen days earlier. The plaintiff might be expected to pursue remedies against the driver's estate, the auto manufacturer and the insurance carriers involved. Ten years later the plaintiff may discover by chance that the car had been in the shop and had been negligently serviced eighteen days before the accident. Unless the statute of limitations bars an action against the repair shop, the statute would have no force and no certainty whatsoever.

The present case is difficult to distinguish from such a hypothetical case. In 1975, a year and four months after their son was killed, the Zelezniks brought suit against the Commonwealth of Massachusetts and officials of the Northampton State Hospital alleging the state's responsibility for Arnold Zeleznik's death because of the release of Walford from the state mental health facility. *See* Exhibit A to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment.

Appendix C

Now, almost ten years later, plaintiffs seek to reassess the responsibilities in a case in which the injury and its immediate cause were well established from the beginning.

A further policy behind statutes of limitations—beyond ensuring prompt presentation of claims to enhance the court's ability to ascertain the truth—is to establish an early resolution of controversies involving the invasion of legal rights. There is little question that the Zelezniks have suffered a grievous loss. Their son's life having been cruely taken away, it is obvious that no court can adequately compensate them for their loss. Yet, in attempting to cope with their loss, the Zelezniks have not shied away from the unpleasant task of ensuring that those in any way responsible for the cruel murder of their son are held accountable for their actions. In bringing legal claims and in spurring legislative investigations, the Zelezniks have brought information to the public that some day may help to prevent a repetition of the situation that led to the death of their son. The statute of limitations is designed to put an end to the anxiety and pain involved in tragedies such as this one. It encourages those suffering injury to promptly bring those responsible to account for their action. It is a harsh result that the Zelezniks must go through life without their son; but it would be harsher still for them to go through life wondering whether there was anything else they could have done. They have done all that anyone could expect them to do.

For the reasons stated above, defendants' motion for summary judgment will be granted.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 84-2409

CARTER ZELEZNIK, et al.

v.

UNITED STATES OF AMERICA

O R D E R

Upon consideration of the motion to dismiss filed by the United States of America, which motion is hereby treated as a motion for summary judgment, and upon consideration of the answer of plaintiffs in opposition to the motion, for the reasons set forth in the foregoing memorandum, it is

Ordered that the motion is granted, and judgment is entered in favor of the defendant and against the plaintiffs.

BY THE COURT:

s/ Donald W. VanArtsdalen

October 18, 1984.

Filed October 19, 1984

Supreme Court, U.S.
FILED
MAR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-885

In the Supreme Court of the United States

OCTOBER TERM, 1985

CARTER ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ARNOLD FRANK ZELEZNIK, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' tort claims were barred by the two-year statute of limitations applicable to the Federal Tort Claims Act, 28 U.S.C. 2401(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-885

CARTER ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ARNOLD FRANK ZELEZNIK, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-12a) is reported at 770 F.2d 20. The opinion of the district court (Pet. App. 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1985, and a petition for rehearing was denied on August 26, 1985 (Pet. App. la-2a). The petition for a writ of certiorari was filed on November 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of the court of appeals' holding that their claims against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*,

were barred by the FTCA's two-year statute of limitations, 28 U.S.C. 2401(b), where petitioners knew both the fact of their injury and its cause in 1974, but did not learn of the identity of the federal government as a potential defendant until 1982.

1. The relevant facts are undisputed. Petitioners are the parents of Arnold Frank Zeleznik, a nine year old boy who was murdered by Vernal Walford on December 20, 1974. Following their son's murder, petitioners investigated Walford's background and learned that he had recently been released from the Northampton State Hospital, a Massachusetts state psychiatric facility, where he had been involuntarily committed. Petitioners brought suit against both the hospital and its personnel in Massachusetts state court, but their suit was dismissed in 1975 on the ground of sovereign immunity. Pet. App. 5a, 13a.

In September 1982, petitioners learned that three weeks prior to the murder, Walford had presented himself at an office of the United States Immigration and Naturalization Service (INS) in Springfield, Massachusetts. Pet. App. 5a, 15a.[1] At that time, Walford allegedly identified himself as an illegal alien, recently released from the state hospital, and reported both his fraudulent possession of an illegal passport and his involvement in an illegal drug transaction. *Ibid.*; *id.* at 13a-15a.[2] Although INS's Springfield office initiated an inquiry into Walford through the Boston, Massachusetts, and Hartford, Connecticut, INS offices, the INS did not detain Walford. *Ibid.*; C.A. App. 44a.

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[1]Petitioners learned this information as a result of an investigation into the practices of the state psychiatric facilities by the Massachusetts legislature. Pet. App. 5a, 15a.

[2]The facts that petitioners allege Walford revealed to the INS officials are contained in their complaint. Pet. App. 14a-15a, quoting Complaint ¶ 11 (C.A. App. 113a-114a).

On September 19, 1983, petitioners filed administrative claims with the INS under the FTCA, both individually, for the wrongful death of their son, and, in the case of petitioner Carter Zeleznik, as administrator of his estate. Petitioners alleged that the INS was negligent in failing to detain Walford and in failing to investigate his past more thoroughly. These claims were denied by the INS by letter dated March 1, 1984. Pet. App. 5a, 15a.

2. Petitioners then commenced this action in the United States District Court for the Eastern District of Pennsylvania, alleging that the INS was negligent in failing to detain, investigate, and deport Walford. The district court granted the government's motion for summary judgment on the basis of the two year statute of limitations contained in 28 U.S.C. 2401(b) (Pet. App. 13a-22a).[3] Identifying the central issue as "when [petitioners'] claim accrued" for the purpose of the two-year limitations period (*id.* at 17a), and relying on *United States* v. *Kubrick*, 444 U.S. 111 (1979), the district court concluded that a claim accrues "[o]nce the injury and its cause are known" (Pet. App. 18a) and that petitioners' FTCA claim accrued in 1974 when both the injury (their son's murder) and its cause (Vernal Walford) were apparent and "put [petitioners] on notice of an invasion of their legal rights" (*id.* at 19a; see *id.* at 18a-20a).[4]

3. The court of appeals affirmed (Pet. App. 3a-12a). The court of appeals agreed with the district court that "the general rule is that the cause of action accrues at the time of

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[3]28 U.S.C. 2401(b), provides, in pertinent part:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues * * *.

[4]The district court also noted that there was no "suggestion * * * that the government acted fraudulently to conceal its contact with Walford." Pet. App. 20a.

the last event necessary to complete the tort," which usually occurs at the time of the injury. *Id.* at 7a. The court noted that there were only three narrow exceptions to that rule—where an injured party is unaware that he in fact has been injured; where the fact of injury alone is insufficient to put an injured party on notice as to its cause; and where the government wrongfully conceals its tortious conduct—none of which was applicable to this case. *Id.* at 7a-9a. As the court explained, the events that occurred in 1974 gave petitioners sufficient notice of the invasion of their legal rights and therefore the burden was on them "to determine within the limitations period whether any party may be liable to [them]" (*id.* at 10a). The contrary rule, the court found, would "make every accrual date indefinite as to unknown possible parties" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

Under the Federal Tort Claims Act (FTCA), a tort claim against the United States is barred unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. 2401(b). The general rule is that a tort claim accrues at the time of a plaintiff's injury. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 120 (1979); *id.* at 125 (Stevens, J., dissenting); *Dyniewicz* v. *United States*, 742 F.2d 484, 486 (9th Cir. 1984); *Richman* v. *United States*, 709 F.2d 122, 123 (1st Cir. 1983); Restatement (Second) of Torts § 899, at 441-442 (1979). Moreover, in the absence of any misconduct by the government concealing its involvement in the actions giving rise to a plaintiff's claim of injury, a claim "accrues" for purposes of the FTCA at the time that the plaintiff is injured

even though he may be unaware of the federal government's potential involvement. See *Gibson* v. *United States*, No. 83-6118 (9th Cir. Jan. 30, 1986), slip op. 18-19; *Dyniewicz*, 742 F.2d at 487; *Richman*, 709 F.2d at 123-124; *Davis* v. *United States*, 642 F.2d 328, 331-332 (9th Cir. 1981), cert. denied, 455 U.S. 919 (1982); *Steele* v. *United States*, 599 F.2d 823, 828 (7th Cir. 1979); see also *Wollman* v. *Gross*, 637 F.2d 544, 547-548 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981); *Snorgrass* v. *United States*, 567 F. Supp. 33, 34-35 (E.D.N.Y. 1983); *Flickinger* v. *United States*, 523 F. Supp. 1372, 1375-1376 (W.D. Pa. 1981); *Lien* v. *Beehner*, 453 F. Supp. 604, 605-606 (N.D.N.Y. 1978).

Under that rule, petitioners' claims were properly dismissed by the district court. Petitioners' injury (the death of their son) occurred in 1974, but petitioners did not file their tort claim with the INS until 1982, well past the limitations period. Additionally, petitioners have not alleged that the government fraudulently concealed the INS's contact with Walford. Pet. App. 19a-20a; C.A. App. 112a-119a (complaint). The lower courts thus correctly held that petitioners' tort claims were untimely.

Petitioners erroneously assert (Pet. 7-11) that the court of appeals' decision conflicts with this Court's ruling in *Kubrick*. In that case, the Court recognized a limited exception to the general accrual principle for medical malpractice claims. In such cases, under what has come to be known as the "discovery rule," the two-year limitations period does not begin to run until a plaintiff discovers (or should have discovered) both his injury and its cause. See 444 U.S. at 120.[5] However, the limited exception recognized in *Kubrick*

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[5] *Kubrick* involved a medical malpractice claim against the Veterans Administration (VA) for negligent treatment of a patient's leg injury with an antibiotic that resulted in his deafness. 444 U.S. at 113-114. It was undisputed in that case that the plaintiff was aware of both his

does not extend beyond the medical malpractice context to ordinary torts like the one at issue here. See, *e.g.*, *Gibson*, slip op. 18-19; *Dyniewicz*, 742 F.2d at 486-487; *Richman*, 709 F.2d at 123; *Steele*, 599 F.2d at 828.

First, the reasons underlying this exception to the general accrual rule—the difficulty in learning within a two-year period following medical treatment whether a plaintiff's "injury" is the consequence of disease or malpractice, as well as a plaintiff's need to rely on his physician, who is the potential tort feasor, for advice as to the nature of his "injury" (see *Kubrick*, 444 U.S. at 120-121 n.7)—are inapplicable in the case of an ordinary tort. The discovery rule was designed simply to put a plaintiff claiming injury from medical malpractice on the same footing as a person claiming injury from an ordinary tort. See *Dyniewicz*, 742 F.2d at 486-487; *Davis*, 642 F.2d at 331; *Steele*, 599 F.2d at 826-827 & n.7. Accordingly, the rule, by its terms, does not extend the period within which a plaintiff claiming injury from an ordinary tort may bring suit.[6] Second, applying the

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injury (his deafness) and its probable cause (the antibiotic) more than two years prior to filing his administrative claim under the FTCA. 444 U.S. at 118. On that record, this Court held that the plaintiff's claim was barred by the statute of limitations, rejecting the court of appeals contrary ruling that his claim did not accrue until he knew or should have known of the " 'possibility that the treatment was improper.' " *Id.* at 116-117 (citation omitted). As the Court recognized, such a standard would "undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government" (*id.* at 123 (footnote omitted)), and "would go far to eliminate the statute of limitations as a defense separate from the denial of a breach of duty" (*id.* at 125).

[6]See *Richman*, 709 F.2d at 123: "Counsel's ingenuity doubtless deserves recognition, but it is misplaced. The delayed accrual of a patient's claim against his physician for malpractice is an exception to the general rule that, in the absence of fraudulent concealment, minority, or other special excuse, a statute of limitations begins to run from the date of the wrongful act."

discovery rule where both the fact and cause of an injury are known, but the government's potential involvement is not, would indefinitely extend the limitations period beyond the two-year term fixed by Congress. See *Richman*, 709 F.2d at 124 ("[t]here would be no limit to when the government might be sued if a plaintiff could assert ignorance as an excuse for not pursuing her claim within the statutory period"). In fact, it was for precisely that reason that *Kubrick* rejected the argument that the limitations period should be tolled until a plaintiff learns that his legal rights have been violated. See 444 U.S. at 122-125. As both the district court and the court of appeals recognized (Pet. App. 10a-11a, 20a), the rule that petitioners espouse would lead to precisely the sort of indefinite extension of the accrual date rejected in *Kubrick*.[7]

Nor does the court of appeals' ruling conflict with *Barrett* v. *United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983). In *Barrett*, the court recognized that a tort claim generally accrues at the time of a plaintiff's injury (689 F.2d at 327), but found that the government had intentionally concealed material facts regarding its responsibility in administering hallucinogens to an unwitting mental patient as part of a military experiment (*id.* at 328-330). In ruling that the plaintiff's claim was timely, the court merely applied the equitable doctrine that

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[7]Petitioners maintain (Pet. 7-11) that the general accrual rule should be modified for their case because they exercised "due diligence" in attempting to discover the INS's contact with Walford. This is an overstatement of the opinions below. The portion of the district court opinion cited by petitioners (Pet. App. 21a) stating that petitioners "ha[d] done all that anyone could expect them to do" was not a finding of fact, but was merely that court's observation that application of a statute of limitations occasionally leads to a harsh result. In any event, a finding of due diligence is irrelevant in the absence of wrongful conduct on the part of the defendant to hide his negligent conduct from the plaintiff. *Dyniewicz*, 742 F.2d at 486-487; *Davis*, 642 F.2d at 331.

a defendant's fraudulent concealment of material facts relating to his wrongdoing tolls the statute of limitations until the plaintiff discovers, or by reasonable diligence should have discovered, the basis of his claim. 689 F.2d at 327-330; see *Richman*, 709 F.2d at 123; *Snorgrass*, 567 F. Supp. at 35.[8] By contrast, in this case petitioners have not alleged that the government fraudulently concealed the INS's contact with Walford. *Barrett* is therefore clearly distinguishable. See *Diminnie* v. *United States*, 728 F.2d 301, 305-306 (6th Cir. 1984), cert. denied, No. 83-6799 (Oct. 1, 1984) (plaintiff must show fraudulent concealment before accrual will be postponed); *Davis*, 642 F.2d at 332. Moreover, the court of appeals recognized that this equitable doctrine is an exception to the general accrual principle under the FTCA. Pet. App. 9a; page 4, *supra*. The court simply found that it did not apply to this case. Petitioners' fact-bound argument to the contrary does not merit further review.

Petitioners also erroneously contend (Pet. 15-17) that the court of appeals' decision conflicts with *Ware* v. *United States*, 626 F.2d 1278 (5th Cir. 1980). The plaintiff in *Ware*, a dairy farmer whose herd of cattle was destroyed by the government based upon a diagnosis of tuberculosis, first learned two years later that the diagnosis was erroneous and that his cattle were in fact healthy. 626 F.2d at 1280-1281. The court held that the plaintiff's claim was not barred by 28 U.S.C. 2401(b), on the ground that "[he] did not know he had suffered damage" since "the government misled [him] into believing that the cattle were killed out of necessity"

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[8]This doctrine provided the basis for decision in several of the cases cited by petitioners. *Bergman* v. *United States*, 551 F. Supp. 407, 421-422 (W.D. Mich. 1982); *Liuzzo* v. *United States*, 485 F. Supp. 1274, 1282-1285 (E.D. Mich. 1980); see *Diminnie* v. *United States*, 728 F.2d 301, 305 (6th Cir. 1984), cert. denied, No. 83-6799 (Oct. 1, 1984) (explaining the basis for the rulings in *Bergman* and *Liuzzo*).

(626 F.2d at 1284). By contrast, petitioners knew in 1974 that they had suffered a compensable legal injury.[9] The government's failure sua sponte to disclose Walford's contact with the INS cannot be treated as fraudulent concealment and clearly did not mislead petitioners (see *Davis*, 642 F.2d at 332).[10] Finally, the court of appeals' ruling does not ignore the "humane purpose[s]" of the FTCA.[11] Pet. 13. Rather, it recognizes, as did this Court in *Kubrick*, that statutes of limitations serve important public policies that must also be given effect. See 444 U.S. at 117-118, 125.[12]

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[9]Petitioners' awareness of their claim is evidenced by their investigation of Walford following their son's murder and their suit against the Commonwealth of Massachusetts. Pet. App. 5a.

[10]The reverse of the "cause" but no "damage" situation in *Ware* is the "damage" but no "cause" situation in *Stoleson* v. *United States*, 629 F.2d 1265 (7th Cir. 1980), also cited by petitioners (Pet. 8). In *Stoleson*, the plaintiff was aware of her physical impairments (heart problems) but not its cause (exposure to nitroglycerin) "since medical science did not then recognize the causal connection [between the two]." 629 F.2d at 1270. The court of appeals held that plaintiff's claim accrued when "Dr. Lange of the Medical College of Wisconsin documented for the first time the relationship between occupational exposure to nitroglycerin and cardiovascular problems." *Ibid.*; see also *McGowan* v. *University of Scranton*, 759 F.2d 287 (3d Cir. 1985) (plaintiffs' decedent died from toxic shock syndrome when cause unknown to medical science). By contrast, petitioners knew the cause of their son's death in 1974.

[11]Petitioners reliance (Pet. 13) on the legislative history of the FTCA limitations statute is equally unavailing. The Court noted in *Kubrick* that, to the extent that the legislative history is helpful, it suggests that Congress extended the limitations period from one to two years to accommodate plaintiffs' interests but nonetheless believed that the time of injury would be the time of accrual. *Kubrick*, 444 U.S. at 119 n.6, citing H.R. Rep. 276, 81st Cong., 1st Sess. 3-4 (1949). Petitioners' analogy (Pet. 13-14) to the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, is also flawed. Unlike the FELA, the FTCA is a limited waiver of sovereign immunity and must be strictly construed in accordance with its terms. *Kubrick*, 444 U.S. at 117-118.

[12]In any event, the decision by INS not to arrest and deport Walford would fit within the "discretionary function" exception to the FTCA, 28

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1986

U.S.C. 2680(a). Cf. *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985); see generally *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349 (June 19, 1984).

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